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No. 82-867
IN THE

# Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

*Petitioner,*

*vs.*

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent.*

## PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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## PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner Faith Center, Inc. has no parent companies, subsidiaries or affiliates within the meaning of S.Ct.R. 28.1.

## CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER CHURCHES AND THEIR MEMBERS SURRENDER THEIR FREE EXERCISE RIGHTS WHEN A CHURCH BECOMES A BROADCAST LICENSEE.

A. The Government's flat rejection of free exercise principles, in contradiction to opinions of this and other courts, highlights the importance of this case to all religious broadcasters. As petitioner originally stated, the central issue presented is whether "a central theological mandate requiring church followers to give donations in secret may be overridden without first requiring the Government to demonstrate a compelling interest in the identity of donors and the details of their giving." Petition

14. Rather than argue that this question is not important (as it clearly is) or that it is resolved by prior decisions of this Court (as it has not) or even that the court below directly addressed and correctly resolved this question (as it did not), the Government simply asserts that "a religious organization has [no] right to be treated differently from other licensees when it comes to the FCC's authority to obtain relevant information" and that therefore both the religious licensee and its members lose all free exercise rights in this context. Opposition 12. The issue presented thus transcends the specifics of petitioner's free exercise claims; the issue is whether <u>any</u> religious broadcasters may <u>ever</u> raise such claims.

The Government's position that religious licensees have no first amendment rights is inconsistent not only with this Court's decisions of the last two decades establishing that religiously motivated conduct may be exempt from general secular regulation, see, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981),[1] but also with

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[1] This Court's observation that when religious adherents "enter into commerical activity as a matter of choice," they must be bound by the same limits as others engaged in that activity, United States v. Lee, 455 U.S. 252, 261 (1982), was made in the context of the compelling governmental need to obtain revenues and to maintain a workable system of taxation. Nothing in Lee suggests that free exercise rights are automatically sacrificed by voluntary entry into commercial activity in all contexts. Indeed both Ms. Sherbert and Mr. Thomas, whose free exercise rights were upheld by this Court, had voluntarily entered into commercial activity by accepting employment. If Lee does stand for the proposition urged by the Government, see opposition 11, it must be reconciled with Sherbert and Thomas, a task that only this Court can perform. See Lee, supra, (Stevens, J., concurring) (suggestion that

a Ninth Circuit decision rendered as recently as January 21, 1983 in a case related to this very proceeding, which holds that the FCC is indeed bound by first amendment constraints when investigating religious licensees. Scott v. Rosenburg, No. 81-5387, slip. op. at 17 (9th Cir. Jan. 21, 1983). Indeed, the Ninth Circuit agreed with petitioner that the FCC's "demand" for donor records can be upheld only if "a compelling governmental interest justifies the demand." Id. at 18. In so doing, the Ninth Circuit rejected the Government's argument, adopted by the Commission and the District of Columbia

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1/ (Cont'd)
Sherbert is in tension with Lee).

Furthermore, the public donors did not engage in "commercial activity" by their religious acts of giving. Yet their free exercise rights are precisely the rights which petitioner has sought to protect throughout these proceedings.

Circuit in this case, that churches should in this context be treated "like any other group." Opposition 11; see App. 1; App. 36. Hence, there exists a direct conflict between the circuits on this critical question regarding the extent, if any, of first amendment rights of religious licensees in FCC proceedings.

Whether there is a compelling governmental interest that would justify compelled disclosure of petitioner's donor records was never addressed below. Petition 25. The Government now halfheartedly asserts that the names of donors are "relevant to an inquiry into the circumstances surrounding their contributions," Opposition 12, a dubious assertion at

best.[2/] The issue, however, is whether the Government's need for information must be compelling, and, if so, whether under the circumstances of this case such a showing can be made. The opposition itself answers this inquiry in favor of petitioners, suggesting that the FCC's investigation would not have been hampered by maintaining the secrecy of donors' identities. See Opposition 14 n.15.

B. Perhaps aware of the weakness of the contention that Faith Center

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[2/] The only conceivable justification for seeking to learn the circumstances surrounding religious contributions to Faith Center would be to determine whether "funds were not used for the purposes described in broadcast solicitations." Opposition 2. Given that this fact may be determined by comparing petitioner's receipts and expenditures, without regard to the source of those receipts, how the identity of donors has "a substantial bearing" on the issue is difficult "to perceive." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958); see Opposition 12 n.14.

and its members lack free exercise rights, the Government alternatively asserts in effect that any first amendment deprivation is de minimus because not all of the relevant discovery requests concerned donor records. Opposition 13. This argument overlooks the fact that nearly half of the interrogatories which petitioner was ordered to answer required disclosure of donor identities and their financial information.[3/] Since the dismissal of Faith

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3/ With respect to the Government's first set of interrogatories, six of the ten questions which the ALJ criticized petitioner for not answering, see 3 Jt. App. 660, requested donor information. See Interrogatories 10, 12, 13-16, 1 Jt. App. 80-81. Of the nineteen questions in the Government's second set of interrogatories which the ALJ determined were not fully answered, see 4 Jt. App. 893-96, seven requested donor information. See Interrogatories 3, 8-11, 32, 36. Even more significant, of the nine interrogatory questions on which the ALJ based his bad faith finding, five requested donor information. 4 Jt. App. 893-96.

Center's license renewal application may have rested at least in part upon petitioner's failure to comply with constitutionally forbidden discovery requests, reversal and remand are required. See Petition 25 n.27. Moreover, if even one interrogatory invaded constitutionally protected domain, thus justifying a failure to respond, the FCC would, of course, be required to redetermine whether, "in light of all of the circumstances," App. 51, dismissal is warranted. Hence, contrary to the Government's position, review by this Court is mandated to vindicate substantial free exercise rights of petitioner and its members.

## THE GOVERNMENT STATES NO REASON WHATSOEVER WHY PETITIONER'S DUE PROCESS CONTENTIONS DO NOT MERIT REVIEW

The commission dismissed petitioner's license renewal application based on a finding of bad faith in its discovery performance, a finding explicitly predicated upon the "critcical significance" of the dismissal by the Court of Appeals of a prior interlocutory appeal. See Petition 15-16. The Government does not dispute that the legal significance attached by the FCC to the dismissal of the interlocutory appeal is erroneous. Hence, for this reason alone, vacation of the order dismissing petitioner's renewal application and reconsideration by the FCC are mandatory.

The Government similarly does not dispute that due process requires that objections to discovery which are grounded in the first amendment be adjudicated prior to the imposition of sanctions. Rather, the Government must assume that because, in its view, petitioner has no first amendment rights, petitioner has no due process rights at all. See Opposition 10-14. This "argument," however, rests upon a fundamental misconception of the nature of due process by assuming that such safeguards are afforded only to meritorious claims. Obviously the due process guarantee exists to ensure that even possibly meritorious claims are recognized. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Accordingly, review by this Court is necessary to rectify the blatant due

process violations at issue here.[4/]

Respectfully submitted,
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[4/] One inquiry that should have been but was not made is an assessment of the potential harm to donors that would ensue from disclosure of their identities. Buckley v. Valeo, 424 U.S. 1, 71 (1976). Not only would donors certainly suffer a grievous spiritual harm from disclosure of their identities, see Petition 21-22, but the record also shows that, contrary to the Government's suggestion, see Opposition 13 n.14, donors are likely to suffer grievous secular harm as well. See 5 Jt. App. 1086, 1138 (bomb threats). Accordingly, this action should be remanded for reconsideration in light of Brown v. Socialist Workers '74 Campaign Committee (Ohio), 51 U.S.L.W. 4015, 4019 (U.S. Dec. 8, 1982) (No. 81776), which held that such potential inquiries have constitutional dimension.